UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:15-cr-10271-WGY

UNITED STATES OF AMERICA

vs.

ALEX LEVIN

****

For Hearing Before:
Judge William G. Young

Motion Hearing

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Friday, March 25, 2016

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P R O C E E D I N G S

(Begins, 2:05 p.m.)

THE CLERK: This is Criminal Matter Number 15-10271, the United States versus Alex Levin.

THE COURT: And again would counsel identify themselves.

MR. TOBIN: Again, good afternoon, your Honor, David Tobin on behalf of the United States and I'm joined today by Jordi deLlano of the United States Attorney's Office.

MR. deLLANO: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. CARNEY: Good afternoon, your Honor, I'm J.W. Carney, Jr., and with me -- well, before I say who's with me, I'm proud to say that I became a member of this court in 1979. My colleague, Nate Dilbert Silver, was admitted to this court last week and today is his first appearance.

THE COURT: Well, you are certainly welcome, sir.

MR. SILVER: Thank you, your Honor.

THE COURT: I am proud to say I became a member of this court 11 years prior to you, Mr. Carney.

All right. But you're both welcome and I see Mr. Levin is here.

THE COURT: I think the substantive argument here

ought not take more than maybe 20, 25 minutes, but I have a question first for Mr. Tobin, but I want to let Mr. Carney or his colleague develop their arguments.

You, without seeking permission of Court, filed an overlong brief and you filed it under seal, and the under seal is what surprises me.

Why did you file your memorandum under seal?

MR. TOBIN: I had to, your Honor, because the motion to suppress was filed under seal. I attempted to file my response in the normal course through PACER, but as you may know, when you try to do that they marry you up to the motion to which you are responding to, and it wasn't posted.

THE COURT: I appreciate that.

MR. TOBIN: And with regard to the overlong, I do apologize, I did simultaneously file --

THE COURT: No, no, I know you did and I denied it. That wasn't my question. It was the under seal.

MR. TOBIN: Oh, Oh, oh, I'm sorry. I didn't see that.

THE COURT: But I see no reason to keep any of these papers under seal and I'm removing the seal.

MR. TOBIN: Nor do I.

THE COURT: Very well.

Let's turn to Mr. Carney.

Mr. Carney, this is a very significant motion in the Court's eyes. I think you have rather the better of it, though I very much want to hear Mr. Tobin, on the issue of was the rule violated, um, and did the magistrate judge act beyond his jurisdiction, so far as the rule goes, and you have the better of it on the issue of prejudice, the witness, Mr. Levin, is presently in custody.

I must tell you, I don't see a basis for suppression. I'm groping for something less than suppression. If there's any suggestion, though I haven't been able to come up with one? I wrestle with the good faith exception, that's where my mind is. I very much want to hear your argument.

MR. CARNEY: Would the Court permit me to give an introductory statement?

THE COURT: Yes, go ahead.

MR. CARNEY: That may be beneficial to persons who are in the courtroom so that they can put it in context.

THE COURT: Fine, but understand we're not going more than 10 minutes here. So go ahead.

MR. CARNEY: In February of 2015, federal authorities obtained a server that contained a large amount of child pornography. The server was brought to the Commonwealth of Virginia. The server was often

contacted by computers using a T-O-R network that preserved the unanimity of the IP address of the computer that was now connecting to the server. The government continued that server to operate but installed malware on the computer that allowed the malware to be sent from the server in Virginia to the computer that was connecting to the server. The malware then identified the IP address of the computer and sent that information to the server, and by having the IP address, federal authorities were able to identify the location now of where the computer was located. They obtained a search warrant from this court, the search warrant was executed at my client's home, and his computer was seized.

The question before the Court, as your Honor has focused with laser-like authority is what is the remedy if that search warrant that allowed the malware put on the server in Virginia to search a computer in Massachusetts was illegal?

Rule 41 of the Federal Rules of Criminal Procedure limits the issuance of a search warrant to the judicial district in which the judge is located. The Federal Magistrate's Act is also applicable because the search warrant, in this case, was issued by a magistrate judge located in Virginia and the Magistrate's Act states that

a magistrate judge may only issue a search warrant that is to be executed within that judicial district. There are exceptions that are inapplicable.

So that what happened here is that the Virginia magistrate judge issued a warrant that allowed the government to search a Massachusetts computer. This cannot be termed a "mere technicality," "a technical violation of the rules" or a "ministerial violation," that they were supposed to return something by a particular day and then they returned it the next day.

THE COURT: But why should suppression result? Let's say arguendo I'm completely with you that far, what we have here is older rules that don't mesh well with the present day digital reality and we need an amendment to the rules, but what happened has happened under the present framework, and I'm not king of the world, I can't change the rules. So the rules are what they are, they appear to have been violated, but why should suppression follow in this case?

It's very hard to see what the FBI could have done. Maybe you can suggest it to me. What could they have done to get authorization for Warrant Number 2, the one you're challenging?

MR. CARNEY: What they could have done, and which they did do, was bring this problem to the attention of

the Department of Justice and indeed a presentation was made by the Department of Justice to the Congress and said, "We need to change the rules," and they submitted an amendment to Rule 41 that would cover this precise situation, which is what should happen if the Congress agrees, but that amendment to the rule is not a guaranteed change, it's receiving opposition from more than just criminal defense counsel, but from such large entities as Google, and they're pointing out why this rule should not be changed.

Why should suppression be ordered here? It's a question of respect for the separation of powers, I submit, a subject on which I've heard your Honor speak many times. We have a rule of the judiciary, the U.S. Supreme Court rule of Criminal Procedure 41, which must be honored by the executive. We have a statute, the Federal Magistrate's Act, where the Congress explicitly said a magistrate judge can only issue a warrant that can be executed within the judicial district. Times have changed. Just like every instance where a rule or statute is changed is a reflection of its time. But when this warrant was sought, the agent had to know that it would be searching computers located outside the judicial district. So it's not an accidental violation of the law, it's a direct violation of the rule and the

statute.

It becomes therefore a jurisdictional issue. If the Congress passes a statute that essentially says to a magistrate judge, "You may not issue a warrant that encompasses a nation-wide search, we are cabining what you can do to a search in your district," and that's what the Congress stated, and the magistrate judge nonetheless issues a warrant that can be executed in all 50 states, that is such a direct violation of a Congressional intent as manifested by the explicit wording of the statute, and that, as one judge said, "is no warrant at all."

Because if we're not going to pay attention to the law as currently written and the rules as currently written, then what meaning do they have? The Constitution puts limits on searches, but the Congress has a right to as well, and a court, in imposing a rule of criminal procedure, has a right to do so as well. And even if it's true, the law should be changed and it needs to catch up. If we say that the law should be changed before it even is changed, then we're ignoring the rules of jurisdiction that are so important.

THE COURT: Recognizing the force of your argument, there is no authority persuasive or otherwise, so far as I have searched, where suppression has

resulted. I mean there have been challenges to this very warrant, but it has not resulted in suppression.

MR. CARNEY: I've never encountered an instance where this court has shide away from being the first to enter an order that no other judge has seen fit to issue.

THE COURT: All right.

MR. CARNEY: And I'm asking your Honor to do so here.

THE COURT: Thank you.

MR. CARNEY: Thank you, your Honor.

THE COURT: Mr. Tobin.

MR. TOBIN: Your Honor, Mr. Carney indicated that the executive branch must follow Rule 41, that obviously is the case, but his real challenge is against the power and the authority of the federal courts to issue warrants. The judge in the ***Michaud*** case, in one of the districts in Washington, found that independent and separate from Rule 41 was a common law right of the federal judiciary to issue warrants.

THE COURT: How can you seriously argue that where there is specific prescribed authority granted to the magistrate judge? We're not talking about interstitial necessity here. No one doubts that there's a common law authority. But that common law authority is prescribed

when you have rules that have the force of law. The rule's been violated here.

You don't seriously suggest it has not?

MR. TOBIN: The Department of Justice's position is the application of the use of the NIT in this instance, on this website, under these circumstances, does not violate Rule 41. I understand that is a losing argument, certainly with this learned judge, so I'm not going to sit here and waste your time espousing it.

THE COURT: Well, I was saying arguendo it seems to me to be a losing argument, but, you know, my mind is open.

MR. TOBIN: Of course it is.

The position of the Department of Justice is that in this situation, under these circumstances, the rule is not violated because, in this instance, as in every one of these -- the cases from this episode of this operation, the defendant chose to intentionally enter the Eastern District of Virginia, he pierced the state boundary, he went into Virginia, he accessed a child pornography website, he pulled things --

THE COURT: That's not where the search took place, the search we're talking about took place when the malware was extracted from his Massachusetts computer, the various data.

MR. TOBIN: Which the defendant knowingly and intentionally brought from Virginia back to -- he brought content from Virginia back to Massachusetts.

THE COURT: And you think that fits the language here?

MR. TOBIN: What he also brought back, unknowing to him, was this malware. And so that's the government's argument in that respect.

One of the judges also found that there's no Fourth Amendment reasonable expectation of privacy in his IP address because it's so readily available to those in the computer world that he has no reasonable expectation of privacy. I bring that to your attention only because I read it in one of your fellow judge's decisions. But I don't think that's going to work either. But I'm just bringing it, I'm highlighting what --

THE COURT: Well, you're certainly prescient, Mr. Tobin, I -- at least as I sit here, I don't think that's going to work.

MR. TOBIN: I understand, your Honor.

THE COURT: Your strongest argument is --

MR. TOBIN: Please.

THE COURT: -- is -- if you want -- it seems to me your strongest argument is, in this developing area, the

agents acted in good faith.

MR. TOBIN: Oh, I agree, Judge, I'm saving the best for last.

THE COURT: Well, in about 5 minutes. Go ahead.

MR. TOBIN: Okay. Even less. Even less.

This case is on all fours with ***Leon***. What we have here are law enforcement --

THE COURT: Well, they knew they were violating.

MR. TOBIN: No.

THE COURT: Look, how many of these warrants have issued, N-I-T warrants?

MR. TOBIN: Oh, I suspect -- oh, how many of the NIT warrants have issued in this country?

THE COURT: Yes.

MR. TOBIN: I don't know. I can tell you that there have been hundreds of cases --

THE COURT: No, how many NIT warrants have issued? You don't know?

MR. TOBIN: I don't know, Judge.

THE COURT: I want to know because I think it goes to the good faith.

MR. TOBIN: Okay.

THE COURT: I'll give you a week. I don't need to know the details, they're a matter of no moment. I want to know how many warrants, when they were issued, the

dates they were issued, and the judicial officers who issued them. That's all I need to know.

MR. TOBIN: One other thing, if I might, Judge?

THE COURT: Yes.

MR. TOBIN: You pointed out very accurately that at least for this NIT in this case, other judges have had the opportunity to wrestle with this issue and none of them have suppressed the evidence that I'm aware of and I have looked.

THE COURT: And so have I and that's correct.

MR. TOBIN: And I do believe you're absolutely correct that the government's best evidence is good faith. And the only thing where perhaps I would respectfully disagree is I don't believe that the officers that were administering this and sending out the NIT and gathering the information had anything but good faith, they didn't know this was illegal, the Department of Justice believed it was accurate.

THE COURT: Really? It's difficult for this Court to believe that against the clear language of the rule and the Magistrate's Act, that they could not have known, the best that can be said -- and there's a Fifth Circuit case, not with respect to Rule 41, but that's right on point, when the officers know the rule, whether or not they think it's enforceable, then it's not good

faith if they go ahead and violate it.

MR. TOBIN: But, Judge, here we have two magistrate judges, two learned members of the court, who gave this its blessing. The officers could certainly look at that.

THE COURT: What -- tell me this.

MR. TOBIN: Of course.

THE COURT: If I were to rule that this is a violation --

MR. TOBIN: Yes, sir.

THE COURT: -- what's the limiting principle then on your argument of good faith? He had no jurisdiction. If I were so to rule.

The magistrate judge has no jurisdiction to issue this nation-wide search warrant.

MR. TOBIN: Of course.

THE COURT: Let's say that's this Court's ruling.

MR. TOBIN: Okay.

THE COURT: Just assume that. If that's this Court's ruling, then how can it be that good faith will save a warrant that he had no authority to issue? If I went for that.

MR. TOBIN: Of course.

THE COURT: If I don't enforce the rule, then where do I stop?

MR. TOBIN: But as I understand it, the good faith exception, you look at the -- you look at the magistrate judge's -- and there's no way around this, but you look at them to essentially see, um, you know -- I won't use the word "colorable" because the case law doesn't use that, but the officers were looking at the magistrate, and the issue isn't what the magistrate thought, I would respectfully submit, but it was what did the officers at that time believe? They had warrants from two respected members of the judiciary authorizing them to do this, were they supposed to secondguess them and say, "Oh, I'm sorry, we can't do this"?

THE COURT: It's not like the officers are acting alone, this is a program of the FBI. You're -- and that's why I want to know how many of these warrants have issued. And it seems pretty clear to me that in the Justice Department this matter has been analyzed, they've brought it to the attention of Congress, they know very well that they're on very shaky ground here, that's what makes this case so difficult.

MR. TOBIN: No, I understand your point, it's clear and I'm reading it, but I should say one point though. According to -- the Department of Justice's position is they are seeking a change to Rule 41 not because they believe that these NITs violated, but

because one judge -- many judges accepted it, but one judge found that this was a problem, and so they then proposed this. I put that in my --

THE COURT: All right.

MR. TOBIN: I thank you for the time.

THE COURT: Thank you.

MR. TOBIN: Oh, could I ask one question about your order just so I can do what the Court is looking for?

You're looking for how many NITs have been authorized by judges across the United States?

THE COURT: Correct.

MR. TOBIN: Is there a period of time by which you --

THE COURT: No, I want to know how many -- how many?

MR. TOBIN: Okay.

THE COURT: What judges? And the dates?

MR. TOBIN: Yes, your Honor.

THE COURT: And nothing else.

MR. TOBIN: Yes, your Honor, I will endeavor to find that for you.

THE COURT: I give you a week to do that.

MR. TOBIN: Thank you, your Honor.

THE COURT: I think I've -- I've read everything

with care, it would be improvident to rule, but having said that I -- I speak now because I think it will be helpful, I'm not asking for any further briefing, um, I -- but I'm going to say what's on my mind.

It appears to me the rule has been violated. It appears to me that the violation has caused prejudice to Mr. Levin. I don't know how I come out on good faith. I am hesitant because I -- it's difficult to know what the officers could have done if they were going to use this type of malware which seems, as I sit here, to be an appropriate way to go about law enforcement. I do believe that the rule ought to be amended, the statute ought be amended, but we take the law as it is now.

Now under the Speedy Trial Act I get 30 days to render my opinion and I will render it. If it comes out -- I can see of various ways that it can come out. If it -- were I to suppress it, we all know -- you all know what your rights are.

MR. TOBIN: Uh-huh.

THE COURT: If I don't suppress it, it's fairly clear to me that I will be put to the task of writing an opinion that says many of the things I have just said and having declared them, in no uncertain terms, it's extraordinarily unlikely that I would ever issue, ever uphold one of these type warrants again.

MR. TOBIN: I understand, your Honor.

THE COURT: I hope you do.

MR. TOBIN: I do.

THE COURT: So we've got 30 days. I'd be interested to see -- it seems to me that if the Department of Justice is serious about this, they can get an amendment. It doesn't seem to me to be a clarifying amendment. They can get an amendment. But I'll take the matter under advisement.

Now while we're still here, I have my 2:30, Mr. Carney quite properly and appropriately has brought his appeal really from the determination of Magistrate Judge Bowler and I will hear you, Mr. Carney, again.

I've read all the papers on this. My reaction is that Magistrate Judge Bowler has been most careful, she always is, and of course the denial is without prejudice. She commends you for your efforts on Mr. Levin's behalf.

How likely is it that you could find him a place acceptable, I won't say to her, but the terms she's looking for are clear. How likely is it that you can find such a place?

MR. CARNEY: Unlikely, your Honor. If I may just add something orally?

THE COURT: Not on the substance. I've heard

enough and I've stuck to that. You can file something further, because I am going to be wrestling with this, but on the issue --

MR. CARNEY: Just a clarifying point that the Court may find helpful.

THE COURT: Go ahead.

MR. CARNEY: I was not the first counsel who represented Mr. Levin, he was appointed a new lawyer at the Federal Defender Office who proposed that Mr. Levin be placed in the custody of a third-party custodian, specifically his brother. The probation department found that the brother was inappropriate as a third-party custodian because he lived in an area where there were children who lived nearby. And then we tried to put him with his parents, well, they're with elderly people.

The problem that I've had is that I never would have proposed a third-party custodian for a United States citizen who's 49 years old, with no prior criminal record, gainfully employed, graduated from high school in Worcester in 1984, then got a college degree, then got a master's degree, he's got a daughter who's in the area, and that's where the flaw is, he doesn't need a third-party custodian and I've never seen a third-party custodian for a situation like this. And as long

as probation is going to say, "Oh, if there are children in the area who live in the next building, that's not an appropriate place," or "There's a bicycle seen on a back porch so this isn't an appropriate place," then I'm never going to find anyone.

So then if the Court did not require -- if the Court ruled that a third-party custodian is not required and remanded it to Judge Bowler for reconsideration, that would be quite satisfactory to the defendant. Thank you.

THE COURT: When is the case on for trial?

MR. CARNEY: We just moved it, your Honor, because of this motion hearing. I believe it's in June.

MR. TOBIN: Mid june.

MR. CARNEY: Mid June, your Honor, was the earliest date that was available.

THE COURT: All right.

MR. TOBIN: Your Honor, although we are not opposed, that we can envision a situation in which conditions can be set where a defendant or this defendant can be released, we very much believe it is appropriate for a third-party custodian. We fully support the decision of Magistrate Judge Bowler. And if Mr. Carney can come forward with another suggestion, the government is happy to look at that with a fresh eye, as

I'm sure Judge Bowler would.

THE COURT: I'm going to leave the terms and conditions of his confinement in place with the following exception. If this Court grants the motion to suppress, I'll hold, um -- the case will be immediately remanded to Judge Bowler for further consideration. It's not unlikely that if I were to do that, the government would appeal, as is their right, and that would cause delay and he would be incarcerated then for a longer period of time and that ought be considered. On the other hand, if I don't suppress it, I expect we'll go to trial promptly and I'm satisfied, since she has left it open as she has, with the current terms and conditions. That's the ruling of the Court.

MR. TOBIN: Thank you, your Honor.

MR. CARNEY: Thank you.

(Pause.)

THE COURT: Yeah, he's remanded to the custody of the marshals.

(Ends, 2:45 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Friday, March 25, 2016, to the best of my skill and ability.

/s/ Richard H. Romanow 04-25-16
____
RICHARD H. ROMANOW Date